Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD S. DEICHMANN
and
USHER'S WATERWORKS, INC.,

Petitioners,

v.

THE BOEING COMPANY,
(doing business as Boeing Defense and Space Group)
formally known as McDonnell Douglas Corporation)

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(A) QUESTIONS PRESENTED

I. SHOULD THIS COURT INTERVENE IN A CASE WHERE THE TRIAL COURT AND THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC) IGNORED THE STANDARDS SET FORTH BY THIS COURT IN *ADICKES v. S.H. KRESS & CO.*, 398 U.S. 144, 157 (1970), *ANDERSON V. LIBERTY LOBBY*, 477 U.S. 242 (1986) AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986) FOR GRANTING A MOTION FOR SUMMARY JUDGMENT, ADOPTED RESPONDENT'S FACTUAL STATEMENTS AND FAILED TO CONSIDER PETITIONERS' FACTUAL STATEMENTS?

II. DOES MAKING A FOUNTAIN NOZZLE SIGNIFICANTLY SIMPLER, AND USING THE NOZZLE IN AN ENTIRELY DIFFERENT TECHNOLOGICAL ENVIRONMENT CONSTITUTE A TRADE SECRET UNDER THE UNIFORM TRADE SECRETS ACT?

III. DID THE CAFC ERR IN NOT GRANTING REHEARING WHEN THE CAFC DID NOT HAVE A COPY OF ONE OF THE SHEETS OF THE DRAWINGS OF A KEY REFERENCE ITEM IN THE RECORD AND THIS WAS BROUGHT TO THE ATTENTION OF THE COURT BY PETITIONERS' MOTION BEFORE THE HEARING WHICH WAS NOT RULED ON BEFORE THE HEARING, AND A PETITION FOR REHEARING ON THIS BASIS WAS DENIED?

IV. CAN A LEGAL INTELLECTUAL PROPERTY EXPERT OPINION BE USED TO ESTABLISH THAT AN EXECUTED CONFIDENTIALITY AGREEMENT CREATES A FIDUCIARY DUTY BETWEEN THE PARTIES WHICH EXTENDS TO A SUBSEQUENT AGREEMENT INCLUDING A DEVELOPMENT AND PRODUCTION CONTRACT BETWEEN THE PARTIES?

V. IF THERE IS AN ACTUAL CONTROVERSY BETWEEN THE PARTIES AS TO INVENTORSHIP, SHOULD THE DECLARATORY JUDGMENT ACT, 28 U.S.C. 2201 AND 2202 BE EXTENDED TO DETERMINE CO-INVENTORSHIP OF A U.S. PATENT UNDER 35 U.S.C. 256, EVEN IF THE PATENTEE HAS NOT SUED, OR THREATENED TO SUE, FOR PATENT INFRINGEMENT?

VI. DOES OBTAINING A TECHNICAL EXPERT OPINION AND A LEGAL EXPERT OPINION CONSTITUTE "TRANSACTIONS, OCCURRENCES OR EVENTS" WHICH HAVE HAPPENED SINCE THE DATE OF FILING A COMPLAINT, CONSTITUTE SUFFICIENT PREJUDICE TO JUSTIFY FILING A SUPPLEMENTAL COMPLAINT UNDER FRCP RULE 15(D)?

(B) THE PARTIES

1. Petitioner Usher's WaterWorks, Incorporated, (Usher's) is a Missouri corporation doing business at 2100 Old Gravois Rd., High Ridge, Missouri 63049. No parent or publicly held company owns 10% or more of the stock of Usher's.

2. Petitioner Ronald S. Deichmann is an individual residing at 6040 Circle Drive, House Springs, Mo., 63119, and is President and a part owner of Petitioner Usher's.

3. Respondent Boeing Company is a corporation located in Seattle, Washington, doing business in St. Louis, Missouri as Boeing Company, having an office at Airport Rd. and McDonnell Blvd., St. Louis, MO., 63146, and on information and belief, has taken over the assets and liabilities of McDonnell Douglas Corporation (MDC), having an address of P.O. Box 516, St. Louis, Mo., 63166.

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(D) CITATION OF REPORTS

The District Court of the Eastern District of Missouri dismissed Count II of Plaintiffs' Third Amended Complaint directed to a Nozzle Production Contract, and Count IV directed to a Declaratory Judgment requesting the Court to grant Declaratory relief under the Declaratory Judgment Act 28 U.S.C. 2201 and 2202 that Plaintiff Ronald S. Deichmann was a co-inventor under 35 U.S.C. 256 in *Deichmann v. Boeing Co.* at 38 F. Supp. 2d 783 (E.D. Mo. 1998).

The District Court granted Summary Judgment on Count I breach of a confidentiality agreement between the parties and on Count III directed to adding Ronald S. Deichmann as co-inventor in *Deichmann v. Boeing Co.*, 36 F.Supp.2d 1166 (E.D. Mo. 1999).

(E) JURISDICTIONAL STATEMENT

1. The U.S. District Court for the Eastern district of Missouri had jurisdiction of this case because a federal question is involved under 28 U.S.C. 1331; 28 U.S.C. 1338, 28 U.S.C. 2201 and 28 U.S.C. 2202 and 35 U.S.C. 256. There was diversity of citizenship because Defendant's head office is in Seattle, Washington, and the amount in controversy exceeds $75,000 under 28 U.S.C. 1332. The case involves a request for Correction of Inventorship of a U.S. Patent under 35 U.S.C. 256, or in the alternative a Declaratory Judgment of Patent Invalidity under 28 U.S.C. 2201 and 28 U.S.C. 2202.

2. Venue was proper in the Eastern District of Missouri because both the Plaintiffs and the Defendant have offices in the Eastern District of Missouri.

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*Respondent has consented to the use of materials marked "confidential" for use in Petitioner's Petition and Appendix. See Appendix OO, p. 278a.

3. The Trial Court's Memorandum and Order granting Summary Judgment was filed March 3, 1999, and the Notice of Appeal was filed in the District Court on March 11, 1999, within 30 days of the March 3, 1999, Memorandum and Order.

4. The initial appeal to the 8th Circuit Court of Appeals is provided for in FRAP 3 and 4.

5. 28 U.S.C. 1631 provides for transfer of appeals to another Circuit where jurisdiction properly resides.

6. 28 U.S.C. 1295 defines the jurisdiction of the Court of Appeals for the Federal Circuit and includes cases based on Patents under 28 U.S.C. 1338.

7. Since this case includes a count for Correction of Inventorship of a U.S. Patent under 35 U.S.C. 256, A-436, 437 jurisdiction resides in the Court of Appeals for the Federal Circuit.

8. 28 U.S.C. 2101 and Rule 10 of the Rules of this Court provide for Petitions for Certiorari to this Court.

(F) CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

[Please see pages A-1 to A-7 herein]

(G) STATEMENT OF THE CASE

1. Respondent's predecessor McDonnell Douglas Corp. (MDC) had been making ultrsonic testing equipment since approximately 1973. It was called automatic ultrasonic scanning systems (AUSS). A-211a.

2. Petitioner Usher's Water Works, a small St. Louis ornamental fountain company had used laminar flow in

fountain nozzles located in amusement parks. A-233a-236a.

3. David Usher, then CEO of Usher's, contacted MDC first to inquire whether or not the technology in fountain nozzles would be adaptable to MDC operations, A-233a.

4. In 1989 an MDC engineer, Richard Lawson, called back concerning laminar flow in fountain nozzles Usher's had located in amusement parks, A-233a, 234a, 236a, and requested a demonstration.

5. Prior to demonstrating fountain designs to MDC, Usher's required MDC to sign a non-disclosure agreement. A-237a, 238a. Lawson Depo. A-248a, 249a. The non-disclosure agreement was executed on July 10, 1989 by MDC and by Usher's on Aug. 10, 1989. A-109a-112a.

6. The agreement provided that MDC, its subsidiaries and affiliates maintain confidential (Par. 3) for five (5) years from that date (Par. 8), with certain exceptions to the confidentiality agreement stated in paragraph No. 5 of Usher's confidential information disclosed by Usher's *trade secrets,* shall remain Usher's property. A-451, 452.

7. In Aug. 1989 two or three MDC AUSS personnel went to Usher's office. Lawson Depo. A-250a. Usher's to MDC. Note Par. 1.01, line 4, includes, "designed *and improved* by Usher's Water Works" In Par. 2. "relating to the coherent nozzle" is not limited to any specific time. Par. 3. "Recipient will not disclose the information to any third party, nor will recipient use the information *for any purpose other than to evaluate* Usher's nozzle)" Paragraph 4 provided that recipient agrees not to engage in any communication with third parties regarding the confidential information disclosed in Paragraph 2, and all property rights, including but not limited to, patent rights and *trade secrets,* shall remain Usher's property. A-111a.

personnel Ronald S. Deichmann and David Usher demonstrated a nozzle operation to the MDC personnel similar to that shown in US Patent 5,160,086, *filed Sept. 4, 1990,* A-277a, without the light transmitting assembly 24, 28. Water flows through double bladder hose 32, enters radially into plenum chamber 11 over weir 22 and then through porous material 20 and out through knife edge orifice 12. However, David Usher may have disclosed the design to MDC at this meeting. Usher Dep. A-240a-243a.

8. The Trial Court and the CAFC found that the features of the nozzle demonstrated to the MDC in August 1989, were well-known and publicly available prior art, based on Fuller U.S. Patent 4,795,092. A-276a.

9. However, Sheet II, Figs 2 and 3 of the Fuller Drawings was not entered into the CAFC Record until Mar. 13, 2000, after the March 10, 2000 CAFC hearing. Fuller discloses a very complicated system to create laminar flow. Water enters tangentially at 11 Fig. 3 into a chamber 17, instead of radially in Ushers. The water then flows vertically through a first screen 19 into a layer of foam 18. The water then flows vertically through the foam and then through a second screen 19 into a flow development chamber 20. The water then flows into a stack assembly 21. The water then flows into a third open chamber, unnumbered above the stacks assembly 21. Water then flows through a third screen 22, into a fourth open chamber, unnumbered and then through a fourth screen 22, and into another unnumbered open chamber. The water then exits at the orifice 12. The CAFC denied a request for rehearing.

10. After design and testing at Usher's facility with the transducer provided by Appellee, this became an Usher's

Trade Secret. Lawson Depo. A-249a-250a. Usher, A-239a-243a. Deichmann A-223a.

11. MDC, either at the first meeting or subsequently, brought to Usher's nozzles which they were dissatisfied with. A-192a-193a. Lawson A-249a-251a. After the confidentiality agreement was executed, Plaintiffs made an improved design of a nozzle for use in an ultrasonic testing system, A-194a-195a, which was an improved Usher's Trade Secret.

12. MDC employees were interested and on October 30, 1989 a request for quote was issued by MDC to Usher's, A-115a-117a, including Phase I Prototype Production; Phase II Pilot Production and Phase II Commercial Production. The Request for quote further provided that "all Phase 1 Development will be considered as co-owned by MCAIR and Usher for use in ultrasonic inspection applications. Prior to Phase II MCAIR and Usher will determine any license agreements for marketing the nozzles to other companies." A-117a.

13. And a purchase order agreement, A-138a-152a, was entered into between the Parties for an Initial Phase I for $18,500. Usher's would provide a nozzle required by MDC to fit into the existing MDC ultrasonic testing equipment. A-138a.

14. Petitioner Ronald S. Deichmann, A-215a-218a, and David R. Usher, A-243a-244a, visited MDC in early 1991 and a prototype device was tested at the MDC. It produced a very long laminar stream, Deichmann A-219a, 220a, Lawson Dep. 251a-253a, which was one of MDC objectives.

15. Petitioner Deichmann, A. 216a-218a, specifically disclosed the trade screte device and its internal parts to MDC personnel, including Richard Lawson, Lawson Depo. A-252a-253a, who were present at the

demonstration. All of the features shown, A-194a-195a, were disclosed to MDC personnel at the demonstration except the internal taper 27 of the knife edge orifice in U.S. Patent 5,431,342, A-108a, to reflect the ultrasonic waves into the porous and the wall and prevent them from going back to the transducer, Deichmann A-227a-230a. MDC copied everything else.

16. It remained a trade secret until it was first disclosed to the U.S. Patent and Trademark Office without Plaintiff's consent, by MDC. The trade secret was lost when the U.S. Patent Office published it in U.S. patent 5,431,242 on July 11, 1995. A-108a.

17. The request for Quote A, A-123a, 125a-132a, were incorporated into the purchase order, A-138a, and provided that a Development Program would be instituted including Phase I Prototype Production, Phase II Pilot Production and Phase III Commercial Production. But in violation of the contract, MDC did not consult with Ushers or issue additional Purchase Orders to Ushers to provide nozzles for the Pilot Production and Commercial Phases.

18. Professor Charles McManus, Intellectual Property Instructor at the Washington University School of Law, has rendered an opinion, A-196a, in Paras. 17-25 that the confidentiality agreement entered into between MDC and Usher's created a fiduciary relationship between the Parties. In view of this relationship MDC had a duty to Usher's to allow Usher's to consult with MDC and then allow Usher's to provide the other nozzle construction for the Pilot and Production Phases of the Program. If there were problems with prototype nozzles which Ushers presented, MDC had a duty to advise Ushers of any such problems, and any needed modifications to the prototypes, so that Usher's could provide the prototypes in

the Pilot Production and the Commercial Production Phases. MDC clearly breached this implied understanding with Ushers, A-196a, in Paras. 17-25, pp. 564-566.

19. Instead MDC made no further contact whatsoever with Usher, and thereby breached this fiduciary obligation.

20. Within about a year of the demonstration, a patent disclosure was filed by several MDC people including Richard Lawson in the MDC Patent Dept. disclosing substantially the identical construction, A-210a, disclosed by Usher's to MDC. The patent disclosure included radial water entry into a cylindrical chamber upstream of the porous material to equalize the pressure in the system. It included a layer of porpos material through which the water passed. In the cylindrical chamber, the opposite end, was a knife edge orifice, A-214a, 2.

21. The only difference in the patent disclosure from Usher's design was in the disclosure the knife edge orifice included an internal tapered surface 7, to reflect ultrasonic waves from bouncing back to the transducer, as discussed above.

22. This combined design provided an ultrasonic testing system which would discern imperfections, including cracks and imperfections in aircraft parts, particularly with ribs, much more effectively than previously, with a high signal to noise radio. A. 214a.

23. The basic nozzle construction was Ronald S. Deichmann's and/or David Usher's disclosure to MDC. This is strongly suggested by the MDC Patent disclosure, A-216a, which suggests additional uses of the concept includes fountain technology. This is an admission by MDC and Boeing that Usher's Waterworks was the true

basis of the MDC disclosure to its Patent Dept. and the resulting 5,431,242 patent. A-108a.

24. Usher's trade secret is the basis of why MDC obtains better results (longer laminar flow stream and better signal to noise ratio), A-214a, in their ultrasound testing of aircraft parts. Usher's trade secret was stated to be an ultrasonic testing breakthrough in a MDC Co. publication, A-211a, and became standard for all of the ultrasonic testing machines utilized by MDC. Lawson, A-256a-258a.

25. Ultrasonic testing machines including Usher's trade secret were sold to Defendant Boeing at the facilities in Wichita, Kansas, A-256a-258a. Furthermore, Usher's trade secret was contained in ultrasonic testing machines purchased by third parties in the U.S. and abroad. A-258a.

26. Petitioner's counsel wrote letters to MDC to try to resolve the conflict without litigation, A-82a. But Respondent's House Counsel's responses left no alternative to litigation. A-94a.

27. Plaintiffs' Third Amended Complaint, A-92a, is for compensatory damages for breach of contract by Defendant and predecessor McDonnell Douglas Corp. (MDC) of the terms of a Confidential agreement Count I, A-99a; breach of the terms of a separate Nozzle prototype Construction contract including Phase I Prototype Production, Phase II Pilot Production and Phase III Commercial Production, A-101a, under the Mo. Uniform Commercial Code (UCC), (p. A-7), for compensatory damages for failure to compensate Plaintiffs for the breach of the confidentiality contract and the Nozzle construction contract up to the present time; for a reasonable royalty for future use, sale and lease of the confidential information and prototype design; for puni-

tive damages for the willful violation by MDC of the terms of the Confidential agreement and the terms of the Nozzle Prototype Construction Contract; for Correction of Inventorship under 35 U.S.C. 256 of U.S. Patent 5,431,342, A-104a, for the error, without deceptive intent, of MDC for failure to name Plaintiff Ronald S. Deichmann as co-inventor of the patent, and Plaintiff Ushers' WaterWorks as part owner of the Patent; or in the alternative for a Declaratory Judgment of Patent Inventorship, A-105a, under 28 U.S.C. 2201 and 28 U.S.C. 2202, and for compensatory damages for failure to compensate Plaintiffs for the inventive contribution to U.S. Patent 5,341,342.

28. Defendant Boeing filed a Memorandum in Opposition to the filing of the Third Amended Complaint. But the Trial Court granted leave to file the Third Amended Complaint, A-36a.

29. Defendant then filed an Answer to Counts I and III of the Third Amended Complaint and a Motion to Dismiss Counts II and IV of the Third Amended Complaint, A-70a. Plaintiffs filed a Memorandum in Opposition to the Motion to Dismiss, A-38a. But the Trial Court granted Defendant's Motion to Dismiss Counts II and IV. A-26a.

30. Discovery and depositions were taken. Petitioners obtained a technical Expert Report, A-153a, by Asst. Professor Pevenik of U. of Wisconsin, and a legal Expert Report by Prof. Charles McMannus of Washington University, A-196a.

31. Defendant then filed a Motion for Summary Judgment as to Counts I and III of the Third Amended Complaint. Plaintiffs filed a Memorandum in Opposition to the Motion for Summary Judgment and their own motion for Summary Judgment, A-38a. But the Trial Court

granted Defendant's Motion for Summary Judgment on Counts I and III, A-8a.

32. Although Petitioner had filed a Technical Expert Opinion, A-153a, and a Legal Expert Opinion, A-196a, after leave to file the Third Amended complaint had been granted, A-36a, the Trial Court ignored these in its Memorandum granting Summary Judgment, A-22a.

33. Petitioner then requested leave to file a Supplemental Complaint under FRCP Rule 15(d), A-45a-47a, alleging specific violations of the UCC and that obtaining the Expert opinions constituted events taking place after the Third Amended complaint was filed warranting leave to file the Supplemental Complaint. But the Trial court refsued to grant leave to file the Supplemental complaint, A-24a. The Court of Appeals for the Federal Circuit affirmed. A-6a.

34. As is apparent from page 1101A, Sheet II, Figs. 2 and 3 of the Drawings, A-276a, was not entered into the CAFC Record until March 13, 2000, after the March 10, 2000 hearing. A-1a-4a.

35. Although page 1101A containing the complicated flow path shown in Figs. 2 and 3 of the Fuller Patent was not in the Record for consideration by the CAFC before and during the hearing on March 10, 2000, the CAFC did not grant rehearing to clearly present the differences between the Fuller structure and the simpler Usher's design because the mandate had already issued. A-1a-4a.

36. This petition followed.

ARGUMENT

I.

SHOULD THIS COURT INTERVENE IN A CASE WHERE THE TRIAL COURT AND THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC) IGNORED THE STANDARDS SET FORTH BY THIS COURT IN *ADICKES v. S.H. KRESS & CO.*, 398 U.S. 144, 157 (1970), *ANDERSON v. LIBERTY LOBBY*, 477 U.S. 242 (1986) AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986) FOR GRANTING A MOTION FOR SUMMARY JUDGMENT, ADOPTED RESPONDENT'S FACTUAL STATEMENTS AND FAILED TO CONSIDER PETITIONERS' FACTUAL STATEMENTS?

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Inferences drawn from the facts must be viewed in the light most faborable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). If summary judgment is to be denied, there must be evidence on which the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment may be granted. *Celotex*, 477 U.S. at 322.

2. Appellant's Factual Statements, A-38a-44a, all include references to the Record in the Trial Court. The Argument portions explained how the statutory and case law are applied to foregoing Factual Statements.

3. The Trial Court ignored Plaintiffs' Facts and instead adapted the Facts as presented by Respondent. A-10a, 19a, 21a.

Appellants' Factual Statement was not considered. This was the Trial Court's first reversible error. *Glaxo Inc. v. Torpharm Inc.*, 153 F.3d 1366, 1371, 1373 (Fed. Cir. 1988).

4. David Usher of Usher's contacted MDC first to inquire whether or not the technology in fountain nozzles would be adaptable to MDC operations. A-236a. The Trial Court ignored this initial contact by Usher's. This was the Trial Court's first factual error in failing to recognize that Usher's contacted MDC first. A-12a.

5. All the Trial Court and/or his clerks had to do was to compare Appellant's design, A-194a, 195a, with Respondent's design, A-192a, 193a, and a prima facie case was established that Appellant's Factual Statements were correct, or at a bare minimum established that there were a number of genuine issues of material fact requiring trial. The Trial Court clearly erred.

6. Footnote 6 in the civil rights case of *Ruby v. Springfield R-12 Public School*, 76 F.3d 909, 911 (8th Cir. 1996) does not save the Trial Court. Since the Trial Court, in its own words, had a duty to resolve all inferences of the Facts in favor of the non-moving party, and "resolve all conflicts of evidence in favor of the non-moving party," A-9a, 10a, the Trial Court had a duty to carefully examine Appellants' Factual Statements, compare them to Respondent's Factual Statements, and "resolve all conflicts of evidence in favor of the non-moving party." Since the Trial court did not do this, but merely adopted Respondent's Facts, the Trial Court egregiously erred.

7. *Kostelec v. State Farm Fire & Casualty*, 64 F.3d 1222, 1229 Footnote 9 (8th Cir. 1995) was tried and a mistrial was requested. It had nothing to do with a Factual Statement in a Motion for Summary Judgment.

Comestically Yours, Inc. v. Clairol, Inc., 424 F.2d 1385, 1387 (CCPA, 1970) was a trademark opposition case in which the CCPA held that likelihood of confusion was not pursued in the Brief or Oral Argument. It has nothing to do with a Factual Statement in a Motion for Summary Judgment case. Thus these cases also do not save the Trial Court.

8. Certiorari is requested to consider if a Trial Court is justified in failing to carefully examine the non-movant's Factual Statements, compare them to the movant's Factual Statements, and resolve all inferences in favor of the moving party. Alternatively, remand to the CAFC, or the Trial Court to consider Petitioner's Facts is requested.

II.

DOES MAKING A FOUNTAIN NOZZLE SIGNIFICANTLY SIMPLER, AND USING THE NOZZLE IN AN ENTIRELY DIFFERENT TECHNOLOGICAL ENVIRONMENT CONSTITUTE A TRADE SECRET UNDER THE UNIFORM TRADE SECRETS ACT?

9. In *Carpenter v. U.S.*, 484 U.S. 19, 98 L.Ed.2d 275, 108 S.Ct. 316 (1987) this Court considered stock market information to be published by the Wall Street Journal and found that the journal had a property right in the confidential trade secret stock market information before it was to be published. A journal writer breached a fiduciary duty by disclosing this information to third parties for his personal benefit. In *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 81 L.Ed.2d 815, 104 S.Ct. 2862 (1984), this court considered pesticide data submitted to the U.S. Government Environmental Protection Agency (EPA) and found that some of the data constituted trade secrets which the EPA used and allowed others to use. This constituted a "taking" under

the 5th Amendment. However, because it was a taking by the Federal Government, the Tucker Act, 28 U.S.C. 1491, was the proper remedy for compensation, rather than the injunction which the Trial Court entered against the EPA.

10. In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974), this Court held that Ohio Trade Secret Law is not preempted by federal patent law, and that novelty in the patent law sense is not required, but only minimum novelty is required. This case involved former employees of Kewanee who joined Bicron.

11. However, it is not seen that this court has considered trade secrets in a common private business environment where a potential supplier supplies technical trade secret information to a manufacturer under a confidential disclosure agreement between the parties in the hope and expectation of supplying proprietary parts, the manufacturer does not award the commercial supply contract to the potential supplier and a breach of confidentiality and breach of contract are alleged by the potential supplier. Moreover, these cases are often in Federal Court because of diversity of citizenship and federal patent questions.

12. In the present case, the Trial Court's second error was that he held that the features of the nozzle demonstrated to the MDC in August 1989, were well-known and publicly available prior art, based on Fuller U.S. Patent 4,795,092. A-276a.

13. However, as apparent from page 1101A, Sheet II, Figs. 2 and 3 of the Drawings which was not entered into the CAFC Record until Mar. 13, 2000, after the CAFC March 10, 2000 hearing. Fuller discloses a very complicated system to create laminar flow. Water enters

cated system to create laminar flow. Water enters tangentially at 11 Fig. 3 into a chamber 17, instead of radially in Ushers. The water then flows vertically through a first screen 19 into a layer of foam 18. The water then flows vertically through the foam and then through a second screen 19 into a flow development chamber 20. The water then flows into a stack assembly 21. The water then flows into a third open chamber, unnumbered above the stacks assembly 21. Water then flows through a third screen 22, into a fourth open chamber, unnumbered and then through a fourth screen 22, and into another unnumbered open chamber. The water then exists at knife edge orifice 12.

14. Usher's nozzle operation in 1989 is shown in U.S. Patent 5,160,086, *filed Sept. 4, 1990,* A-227a, without the light transmissing assembly 24, 28. Water flows through double bladder hose 32 and enters *radially* into plenum chamber 11 over weir 22, then through porous material 20 and out through knife edge orifice 12. Usher's design, A-194a, 195a, is a much simpler and less expensive design than the one in the Fuller Patent. After successful testing at Usher's facility with the transducer provided by Appellee, this became an Usher's Trade Secret. Usher, A-242a, 243a; Deichmann A-212a-213a.

15. Furthermore, the Trial Court overlooks these differences and that a nozzle used in fountains in amusement park, column 1 of *Fuller* and in an industrial factory ultrasonic testing environment is an entirely different environment from nozzle use in an amusement park. In an amusement park the nozzle is below the surface of the water and is not visible. The laminar stream above the water is on display. In the ultrasonic testing environment the nozzle is hidden within other equipment to test structural material for its integrity.

16. Ronald S. Deichmann, A-215a-217a, and David R. Usher, A-243a-244a, visited MDC in early 1991 and a prototype device was tested at the MDC. It produced a very long laminar stream. Deichmann Depo. A-219a-220a; Lawson Depo. A-251a-253a. Deichmann specifically recalls disclosing the device and its internal parts to MDC personnel including Richard Lawson. Lawson Depo. A-251a-254a. All of the features shown on in A-194a, 195a, were disclosed to MDC personnel at the demonstration, and MDC copied these features. Pevenick Expert Opinion, A-157a.

17. The *Uniform Trade Secrets Act* (UTS), has been enacted in Missouri at RS Mo. 417-450 through 417.-467. A-2 - A-6. Under 417.453 a trade secret includes information including but not limited to, technical or non-technical data, a formula, pattern, compilation, program, device, method, technique or process that derives independent economic value, actual or potential, from not being generally known to, or not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.

18. Misappropriation includes disclosure or use of the trade secret of a person without the express or implied consent of another person at the time of disclosure who knew or had reason to believe that the trade secret was acquired under circumstances giving rise to a duty to maintain it secret.

19. Usher's laminar flow nozzle was a trade secret under RS Mo. 517.453 which was disclosed to MDC under circumstances giving rise to a duty to maintain its secrecy when MDC signed a secrecy agreement, A-109a, agreeing to do this.

20. MDC violated RSMo. 417.453 when it failed to maintain its secret and disclosed Ushers trade secret to the U.S. Patent and Trademark office in two patent applications, A-108a, within the five-year period of confidentiality, A-110a, and to customers of MDC including Boeing personnel at Wichita KS and others. Lawson Depo. A-256a-258a.

21. Thus Ushers device was clearly a valid trade secret under the UTS. See A-156a, 157a, Expert Opinion of Pevenick; A-196a, and Expert Opinion of Prof. McManus. *Kewanee, supra,* only minimum novelty required, *Carboline v. Jarboe,* 454 S.W.2d 540 (Mo. S.Ct. 1970); *Curtiss-Wright v. Edel-Brown Tool & Die Co.,* 407 N.E.2d 319 (Supreme Judicial Court of Mass. 1980), where the shape of pistons for engines was generally known, but pistons for R-1820 engine held to be a trade secret; and *Rockwell Graphic Systems v. DEV Industries,* 17 USPQ 2d 1780 (7th Cir. 1991) printing press structure generally known, but specific printing press components held to be trade secrets. And in *American Airlines v. K.L.M. Royal Dutch Airlines,* 114 F.3d 108 (8th Cir. 1997), and *Mangren Research & Development Corp. v. National Chemical,* 39 USPQ 2d 1339 (7th Cir. 1996) these Courts held that it need not be shown that Defendant copied all elements.

22. In *Woven Electronics v. The Advance Group, Inc.,* 19 USPQ 2d 1439, 1441 (4th Cir. 1991), the Court held that "a trade secret may exist solely in the manner in which a group of elements is put to use, even though each of the items is itself within the public domain". Thus even assuming, without agreeing, that *the complicated Fuller* included some elements of Appellants' trade secret in an amusement park application, since a trade secret may exist solely in the manner in which the

group of elements is put to use, the use of these elements in an industrial ultrasonic testing apparatus was a valid trade secret. And *Woven* protected the secret by the use of a confidential agreement, *id* 1441, as in the present case where Appellants' required Respondent's MDC people to sign a confidential agreement. A-109a. Thus it is clear that Usher's had a valid trade secret.

23. Certiorari to consider the UTS in a common, private business environment, or remand to the CAFC, or the Trial Court for Trial is respectfully requested.

III.

DID THE CAFC ERR IN NOT GRANTING REHEARING WHEN THE CAFC DID NOT HAVE A COPY OF ONE OF THE SHEETS OF THE DRAWINGS OF A KEY REFERENCE ITEM IN THE RECORD WHEN THIS WAS BROUGHT TO THE ATTENTION OF THE COURT BY PETITIONERS' MOTION BEFORE THE HEARING AND THE MOTION WAS NOT RULED ON BEFORE THE HEARING, AND A PETITION FOR REHEARING ON THIS BASIS WAS WRONGLY DENIED BECAUSE THE MANDATE HAD ISSUED?

24. In *Fuller,* A-276a, Sheet I, Figs 2 and 3 of the Drawings was not entered into the CAFC Record until Mar. 13, 2000, after the March 10, 2000 hearing.

25. Since this page containing the complicated flow path shown in Figs. 2 and 3 of the Fuller Patent was not in the Record for consideration by the CAFC before and during the hearing on March 10, 2000, the undersigned filed a Petition for Rehearing. A-1a-5a.

26. But the CAFC erred in not granting rehearing to allow the undersigned to clearly present the differ-

ences between the Fuller structure and the simpler Usher's design with the missing page before the court at the hearing. Certiorari or Remand to the CAFC to consider this missing drawing issue is requested.

IV.

CAN A LEGAL INTELLECTUAL PROPERTY EXPERT OPINION BE USED TO ESTABLISH THAT AN EXECUTED CONFIDENTIALITY AGREEMENT CREATES A FIDUCIARY DUTY BETWEEN THE PARTIES WHICH EXTENDS TO A SUBSEQUENT AGREEMENT INCLUDING A DEVELOPMENT AND PRODUCTION CONTRACT BETWEEN THE PARTIES?

28. As mentioned here above, prior to demonstrating fountain designs to MDC Usher's required MDC to sign a non-disclosure agreement. Usher, A-109a. The non-disclosure agrement was executed on July 10, 1989 by MDC and by Usher's on Aug. 10, 1989. A-111a.

29. The agreement provided that MDC, its subsidiaries and affiliates maintain confidential (Par. 3) for five (5) years from that date (Par. 8), with certain exceptions to the confidentiality agreement stated in paragraph No. 5, Ushers' confidential information disclosed by Usher's to MDC. Note Par.1.101, line 4, includes "designed *and improved* by Usher's Water Works" In Par. 2 "relating to the coherent nozzle" is not limited to any specific time. Par. 3 "Recipient will not disclose the information to any third party, nor will recipient use the information *for any purpose other than to evaluate* Usher's nozzle—" Paragraph 4 provided that recipient agrees not to engage in any communication with third parties regarding the confidential information *without prior written consent of* Ushers Waterworks. Paragraph 6 of the agree-

ment further provides that concerning the confidential information disclosed in Paragraph 2, all property rights, including but not limited to, patent rights and *trade secrets,* shall remain Usher's property. This agreement created a fiduciary duty of acting in good faith, disclosure of problems and successes and working together to solve problems which would arise with the Program. McManus Opinion, A-196a-199a.

30. Then in Aug. 1989 two or three MDC personnel went to Usher's facility. Lawson Depo. A-250. Usher's personnel Ronald S. Deichmann and David Usher demonstrated a nozzle operation to the MDC personnel similar to that shown in U.S. Patent No. 5,160,086, *filed Sept. 4, 1990,* A-277a, as discussed hereinabove, but without the light transmitting assembly 24, 28.

32. After viewing a laminar flow demonstration at Usher's, MDC employees were interested and on October 30th, 1989 a signed request for quote was issued by Lawson of MDC to Usher's, A-115a-117a, including Phase I Prototype Production; Phase II Pilot Production and Phase III Commercial Production. Lawson Depo. The nozzle assembly quantities were provided for all three Phases; 2 for Phase I, 8 for Phase II and 12-20 for Phase II, with 8 week delivery. Only the price for the nozzle assemblies in the Pilot and Production Phases was missing.

32. The Request for quote further provided that "all Phase 1 Development will be considered as co-owned by MCAIR and Usher for use in ultrasonic inspection applications." A-116a. "Prior to Phase II MCAIR and Usher will determine any license agreements for marketing the nozzles to other companies." A purchase order followed, A-138a, which provided for an Initial Phase I for $18,500.

33. The Request for Quote by MDC, A-115a, 117a, and the Quotes by Ushers, A-123a-125a, were incorporated into the Purchase Order as part of MDC 858 attachments. A-138a. Thus uder the UCC and RSMo. 400.2-304, a valid and enforceable contract was entered into between the parties.

34. Moreover, Prof. Charles McManus, Intellectual Property Professor at the Washington University School of Law in St. Louis rendered an opinion, A-196a-199a, that the confidentiality agreement entered into between MDC and Usher's created a fiduciary relationship, A-199a, between the Parties.

35. This fiduciary duty required MDC to 1) not license or use the co-owned trade secret in such a manner as to destroy or deplete the value of the trade secret to the non-using co-owner without the express consent of the co-owner; 2) to compensate the co-owner for any lost value or expectancy arising out of a use or license constituting a breach of the foregoing duty, and 3) to account for any profits made by such use or license.

36. This "good faith" obligation was breached by MDC in failing, A-115a-117a, to "1.1.3 Discuss any improvements—; 1.2.1 Design enhancements; 1.2.2 Final Design Review; 1.2.7 Resolve any variability problems and rework as necessary—, build second nozzle, and notify Usher's and Plaintiff Deichmann of MDC's intent to file a patent application. This agreement created a duty of acting in good faith, disclosure of problems and successes, and working together to solve problems which would arise with the Program. If there were problems with prototype nozzles which Ushers presented, MDC had a duty to advise Ushers of any problems and any needed modifcations to the prototypes. Instead even though David

Usher called MDC after the demonstration, p. 8a, MDC made no further contact whatsoever with Ushers, and thereby breached this agreement.

37. Federal Rule of Evidence 702 provides that expert testimony is appropriate if the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue with an opinion. In *Marx Co. v. Diner's Club*, 550 F.2d 505, 508-511 (2nd Cir. 1977), Legal Expert Friedman testified extensively, and provided testimony that aided the jury, although a portion was found to be inadmissible. In *Baldridge v. Lachs*, 883 S.W.2d 947, 954, 955 (Mo. App. D.C., 1994), a legal expert opinion in a legal malpractice case was received.

38. Prof. McManus opinion would assist the trier of fact to understand these issues and give an opinion on the application of fiduciary duty to these Facts. Thus the Declaration and Opinions of Prof. McManus are entirely appropriate and establish that the secrecy agreement created a fiduciary duty of good faith communication which duty MDC breached.

39. MDC's conduct was very egregious. Not only substantial compensatory damages but punitive damages are appropriate for violation of a fiduciary duty resulting from the confidential agreement which MDC completely ignored. *W.R. Grace & Co. v. Hargadine*, 302 F.2d 9 (9th Cir. 1968).

40. Certiorari to consider the role of Legal Expert legal opinions in contract litigation or Remand to the CAFC or to the Trial Court is respectfully requested.

V.

IF THERE IS AN ACTUAL CONTROVERSY BETWEEN THE PARTIES AS TO INVENTORSHIP, SHOULD THE DECLARATORY JUDGMENT ACT, 28 U.S.C. 2201 AND 2202 BE EXTENDED TO DETERMINE CO-INVENTORSHIP OF A U.S. PATENT UNDER 35 U.S.C. 256, EVEN IF THE PATENTEE HAS NOT SUED, OR THREATENED TO SUE, FOR PATENT INFRINGEMENT?

41. The Fourth Count was provided in the Third Amended Complaint, A-105a-106a, in the event that the evidence establishes that MDC did not act without deceptive in failing to name plaintiff Ronald S. Deichmann as an inventor of U.S. patent 5,431,342.

42. The Trial Court held that there was no actual justifiable case or controversy because no infringement claim or potential suit patent for infringement was eminent. A-33a-55a.

43. However, A-82a is a copy of a letter sent to Ms. Deborah Morgan dated April 5, 1997 attaching the confidentiality agreement which MDC breached as alleged in Count I and further on page A-83a contains the clear allegation that MDC failed to properly identify the inventors of U.S. Patent No. 5,431,342 in the U.S. Patent and Trademark Office.

44. A-89a is a response from Ms. Deborah Morgan flatly denying that any inventive contribution was made by Usher's Waterworks and that the entire invention was that of MDC. To the extent that Ms. Morgan speaks for the named inventors of U.S. Patent 5,341,342 there appears to be a clear controversy. There was such a controversy when this case was filed.

45. A-86a-88a is a Declaration by Plaintiff Ronald S. Deichmann describing at least a portion of his inventive contribution to '342 Patent.

46. In his Declaration, A-88a, he discusses the above letters.

47. It therefore is clear that at the time this suit was filed there was a clear controversy between the parties concerning the inventorship of the '342 patent.

48. Richard Lawson of MDC testified, A-261a-268a, that the basic elements of radial entry, cylindrical plenum chamber, layer of porous material and knife edge orifice were contained in the Prototype and Photographs of the Prototype. MDC derived these from Ushers. *Marathon Oil Co. v. Firestone Tire & Rubber Co.*, 205 USPQ 520, 534, 535 (D.C. N.D. Ohio 1979).; *Ackerman v. Borden*, 202 USPQ 118, 122, 123 (PTO Bd. of Intf. 1978).

49. It is submitted that the Declaratory Judgment Act, 28 U.S.C. 2201 coupled with the Patent Correction Statute of Misjoinder of Inventor, 35 U.S.C. Section 256, is a totally correct and proper legal procedure to correct any deceptive intent which could have occurred by MDC through a Declaratory Judgment that Ronand D. Deichmann is a co-inventor of the '241 Patent.

50. The Trial Court, A-33a, relies on *Cardinal Chemical Co. v. Morten International*, 508 U.S. 96 (1993) and *Jervis B. Webb Co. v. Southern Systems, Inc.*, 742 F.2d 1388, 1398 (Fed. Cir. 1984) as support for the proposition that no actual controversy exists. But consider the controvery described above in Pars. 43-47 hereinabove. The *Webb* case was decided in 1984 considerably before the *Cardinal Chemical* case.

51. The Trial Court has also cited *BP Chemical Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 978 (Fed. Cir. 1993) for the proposition that Defendant should have either

sued or threatened to use to create an apprehension of a patent infringement suit in order to obtain jurisdiction.

52. However, as discussed in *BP Chemicals*, at pages 977-988, the issue is much broader. "There must be a definite and concrete dispute between adverse parties, appropriate to immediate and definite determination of their legal rights. The difference is necessarily one of degree, and is determined on tht totality of the circumstances. Thee is no simple rule that addresses all shades of relationships between the disputants. The sole jurisdictional requirement is that there be a real and immediate conflict. The present conflict between Plaintiffs and Defendant as to proper inventorship of the '342 patent is believed to be clearly such a conflict.

53. Moreover, in *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S.Ct. 1967 (1993), this Court held a previous practice by the Court of Appeals for the Federal Circuit of dismissing anti-trust counterclaims when no infringement was found, was incorrect and that the anti-trust counterclaims should be considered. The relevance of this case as to the present factual situation is two-fold. (i) This Court has recognized that infringement is no longer necessary for Declaratory Judgment jurisdiction involving actions for patent invalidity. (ii) Declaratory Judgment actions for patent invality benefit both parties and the public. Thus *Cardinal Chemical* indicates that this Court does have jurisdiction of Declaratory Judgment actions concerning patent invalidity even if infringement is not alleged.

54. Furthermore, a review of the cases cited by the Trial court reveals that in none of these cases was there an effort by the parties seeking to utilize the Declaratory Judgment Act in combination with a Count under 35 U.S.C. 256 to correct inventorship of a U.S. Patent. It

is thus submitted that the Declaratory Judgment Act under 28 U.S.C. 2201 coupled with Correction of Inventorship provided in 35 U.S.C. 256 provide a simple and convenient way to resolve a present clear conflict of the parties concerning the proper inventorship depending on whether the evidence developed during discovery and at trial under oath confirms the existence of the present controversy. It is believed that this is a useful, practical extension of *Cardinal Chemical* to a factual situation when infringement or threat of infringement does not exist.

55. Certiorari to consider whether infringement or potential infringement is necessary for a Declaratory Judgment hearing on inventorship is necsssary. Alternatively, remand to the CAFC or the Trial Court is respectfully requested.

VI.

DOES OBTAINING A TECHNICAL EXPERT OPINION AND A LEGAL EXPERT OPINION CONSTITUTE "TRANSACTIONS, OCCURRENCES OR EVENTS" WHICH HAVE HAPPENED SINCE THE DATE OF FILING THE THIRD AMENDED COMPLAINT, CONSTITUTE SUFFICIENT PREJUDICE TO JUSTIFY FILING A SUPPLEMENTAL COMPLAINT UNDER FRCP 15(d)?

56. Rule 15(d) of the Federal Rules of Civil Procedure (FRCP) provide that a Court may permit a party to serve a supplemental leading setting forth transactions or events that have taken place since the filing of the original pleading, thereby bringing the case up-to-date. Leave must be sought by motion upon reasonable notice to the other parties and the court may impose such terms as are just.

57. The second sentence of Rule 15(d) expressly provides that the party inter-posing a supplemental pleading may state facts occurring since the filing of the original pleading that have the effect of correcting defects in the original statement of claim or defense.

58. In 1963 a more liberal amendment of Rule 15(d) was provided to allow supplemental pleadings even though the original pleading is defective in its statement of a claim.

59. In *Texarkana v. Arkansas,* 306 U.S. 188 (1939), involving actions brought by a Texas city for an injunction against breach of a provision of a public utility franchise, and for reparations to consumers for charges made in breach of such provision, this court upheld the validity of the franchise provision under which a gas company was not permitted to charge rates in a Texas city in excess of those it charged in an adjoining Arkansas city, and stated that leave to file a supplemental petition to bring up to date the controversy over the refund of rates collected after a certain date should be granted.

60. In *Mathews v. Diaz,* 426 U.S. 67, 48 L.Ed.2d 478, 96 S.Ct. 1883, this court held that Espinosa's filing of an application, thorugh not made until he had become a party, met the nonwaivable jurisdictional condition imposed by 42 U.S.C. 405(g) that a claim for benefits under the Social Security Act shall have been presented to the Secretary of Health, Education, and Welfare, and that *the pleadings may be treated as properly supplemented by appellant's stipulation that Espinosa had filed an application.*

61. In *Griffin v. School Board of Price Edward County,* 377 U.S. 218 (1964), the 4th Circuit had first ordered

the District Court to admite Negro students to the public schools on a non-discriminatory basis. Ten years later in 1961 Petitioners filed a supplemental complaint alleging the improper use of state funds to support segregated schools and seeking to enjoin respondents from refusing to open the public schools. This court sustained the filing of this supplemental complaint implicitly on the basis of "transactions or events that have taken place since the filing of the original pleading" in Rule 15(d).

62. However, the Undersigned's research indicates that this Court has not considered whether obtaining one or more Expert Opinion(s) constitutes in Rule 15(d) "transactions or events that have taken place since the filing of the original pleading" in Rule 15(d) to overturn a denial of leave to file the supplemental complaint.

63. Appellants filed a Motion to file First Supplemental Complaint Under Seal, A-45a, and Supporting Memorandum of Law. The First Supplemental Complaint, A-47a-64a, contains changes to include specific relevant portions of the UCC, A-58a, 59a, to overcome the problems which the Court discussed in its Memorandum and Order of Oct. 14, 1998, A-31a. Leave to file should have been granted for the following reasons.

64. The third amended complaint, A-92a, was based upon information received by plaintiffs as a result of Defendant's response to Plaintiffs' Request for Production of Documents. Since Plaintiffs did not previously possess the documents it was not possible for Plaintiffs to previously include the allegations contained in the Third Amended Complaint.

65. After the Third Amended Complaint was filed, Defendant filed a Memorandum in Opposition to Plaintiffs' Motion to Modify Scheduling Order, arguing that filing of the Third Amended Complaint should be denied based basically on the same arguments contained in Defendant's Motion To Dismiss the third Amended Complaint.

66. Since the Court granted leave to file the Third Amended Complaint in its Order dated July 17, 1998, A-36a, 37a, Appellants believed that the issue of the substance of the Third Amended Complaint had already been decided by the Court.

67. Therefore the Undersigned obtained a Technical and a Legal Expert and had them rendered opinions on the subject matter of Count I-III of the Third Amended Complaint, A-153a and A-196a, and included these as reasons why Defendant's Motion to Dismiss Count ii should be denied. Both Expert Opinions, A-158a, 159a, found the contract alleged in Count II as valid and enforceable.

68. Plaintiffs were seriously prejudiced by the Court's dismissal of Count II in the Third Amended complaint, and the fact that the Experts addressed the merits of Counts I-III.

69. Count II was only contained in the third Amended complaint. It therefore is believed to be fair and just, since the expert opinions had been obtained, to give Plaintiffs at least one opportunity to correct any deficiencies in Count II, including specific reference to the Uniform Commercial Code (U.C.C.) in Missouri. RSMo. 417.453-467 (p. A-2 - A-6).

70. The Trial Court's Opinion is directed to the position that there were missing terms in Phases II and III of the Nozzle Prototype construction contract. A.31a. But the nozzles assembly quantities were provided for all

three Phases; 2 for Phase I; 8 for Phase II and 12-20 for Phase III, with 8 week delivery, A-115a-118a. Only the price for the nozzle assemblies in the Pilot and Production Phases were missing.

71. However, although the precise price of the for the Phase II Pilot Production Phase and the price for Phase III Commercial Production Phase were not specified in the contract, the contract was still valid and enforceable under the UCC which was in effect in Missouri at the time of making the Nozzle Prototype Production contract. RSMo.

72. Concerning price the UCC in RSMo. 400.2-305 provides that if the price is left open, "the price is a reasonable price at the time of delivery". Thus, failure to state prices of the nozzles for the Pilot Production and Commercial Phases, did not invalidate the contract.

73. Certiorari to consider whether obtaining a Technical Expert Report and a Legal Expert Report concerning the subject matter of Counts I-III of the Third Amended Complaint, constitute transactions and occurrences since the filing of the complaint which warrant granting leave to file a Supplemental Complaint under Rule 15(d) is respectfully urged.

74. Alternatively, remand to the CAFC or Trial Court is requested because the Trial Court abused its discretion in denying leave to file the First Supplemental complaint.

Respectfully submitted,

Henry W. Cummings

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) 28 U.S.C. 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

2) 28 U.S.C. 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3) 35 U.S.C. 256. Misjoinder of inventor

Whenever a patent is issued on the application of persons as joint inventors and it appears that one of such persons was not in fact a joint inventor, and that he was included as a joint inventor by error and without any deceptive intention, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed,

issue a certificate deleting the name of the erroneously joined person from the patent.

Whenever a patent is issued and it appears that a person was a joint inventor, but was omitted by error and without deceptive intention on his party, the Commissioner may, on application of all the parties and assignees, with proof of the facts and such other requirement as may be imposed, issue a certificate adding his name to the patent as a joint inventor.

The misjoinder or nonjoinder of joint inventors shall not invalidate a patent, if such error can be corrected as provided in this section. The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned and the Commissioner shall issue a certificate accordingly.

MO. UNIFORM TRADE SECRETS ACT

417.453. Definitions

As used in sections 417.450 to 417.467, the following terms mean:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation":

(a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of a person without express or implied consent by another person who:

a. Used improper means to acquire knowledge of the trade secret; or

b. Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or

c. At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

i. Derived from or through a person who had utilized improper means to acquire it;

ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(3) "Person", a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, governmental subdivision or agency, or any other legal or commercial entity, whether for profit or not for profit;

(4) "Trade secret", information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(L.1995, S.B. Nos. 80 & 88, § A(§ 2).)

417.455. Actual of threatened misappropriation—injunction

1. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

2. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use coulc have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

3. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

(L.1995, S.B. Nos. 80 & 88, § A(§ 3).)

417.457. Damages for misappropriation

1. Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of

liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

2. If misappropriation is outrageous because of the misappropriator's evil motive or reckless indifference to the rights of others, the court may award punitive damages.

(L.1995, S.B. Nos. 80 & 88, § A(§ 4).)

417.459. Preservation of secrecy by court

In an action under sections 417.450 to 417.467, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

(L.1995; S.B. Nos. 80 & 88, § A(§ 5).)

417.461. Limitation of actions

An action for misappropriation shall be brought within five years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

(L.1995, S.B. Nos. 80 & 88, § A(§ 6).)

417.463. Available remedies

1. Except as provided in subsection 2 of this section, sections 417.450 to 417.467 displace conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.

2. Sections 417.450 to 417.467 shall not affect:

(1) Contractual remedies, whether or not based upon misappropriation of a trade secret; or

(2) Other civil remedies that are not based upon misappropriation of a trade secret; or

(3) Criminal remedies, whether or not based upon misappropriation of a trade secret; or

(4) The discovery of facts, opinions, information, documents, things, and any other matters discoverable in litigation, except in litigation which alleges misappropriation of trade secrets as a cause of action.

(L.1995, S.B. Nos. 80 & 88, § 4(§ 7).)

417.465. Application and construction of act

Sections 417.450 to 417.467 shall be applied and construed to effectuate their general purpose of making uniform the law with respect to the subject of trade secrets among states enacting them.

(L.1995, S.B. Nos. 80 & 88, § A(§ 8).)

417.467. Misappropriations begun prior to effective date of act

With respect to a continuing misappropriation that began prior to August 28, 1995, sections 417.450 to 417.467 shall not apply to the continuing misappropriation that occurs after such date.

(L.1995, S.B. Nos. 80 & 88, § A(§ 9).)

MO. UNIFORM COMMERCIAL CODE

400.1-203. Obligation of good faith

Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.

(L. 1964, p. 515, § 1–203.)

400.2-305. Open price term

(1) The parties if they so intend can conclude a contrade for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) Nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as canceled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

(L.1963, p. 522, §2–305.)

EXCERPTS FROM DEPOSITION OF DAVID R. USHER

(December 16, 1998)

[55] but it was nearly perfect.

They started taking readings on it, but they would not let me look at what the reading were. They would not let me see the screen. So in other words, I never got to see how well that nozzle was working for them. Basically they had some kind of computer with software that would read the vibrations coming back, and then turn that into an image as they scanned a laminated part. So basically that was the last we ever heard from them. I tried calling Mr. Lawson. I never heard from him again. I didn't hear anything else until one day somebody – I don't recall who it was, but it was not Mr. Deichmann or any of these people. Somebody mentioned that McDonnell Douglas has gotten a patent, and I looked up a copy of it. Basically there is the nozzle that I produced for them with what I would call a strategic modification. It's the same principle. It's the same nozzle as what they saw, as what I produced for them. The difference is in the shape of the material that is inside the nozzle.